Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of	) MM Docket No. 92-33
CENTRAL FLORIDA EDUCATIONAL FOUNDATION, INC. Union Park, Florida	) File No. BPED-881207MA
HISPANIC BROADCAST SYSTEM, INC. Lake Mary, FL	) File No. BPED-891128ME
For Construction Permit, New Noncommercial, Educational FM Stations	)

To: The Review Board

EXCEPTIONS OF HISPANIC BROADCAST SYSTEM, INC.

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SUMMARY

These are the Exceptions of Hispanic Broadcast Systems, Inc. in connection with what has become a two party proceeding involving applications for new noncommercial FM broadcast stations in Union Park, Florida and Lake Mary, Florida. The case was decided solely on the 307(b) issue. The Presiding Judge refused to receive evidence on the 307(b) issue other than that contained in the Joint Engineering Exhibit. Hispanic respectfully excepts to the Presiding Judge's failure to consider other evidence.

STATEMENT OF THE CASE

This proceeding is a comparative broadcast hearing conducted pursuant to the Hearing Designation Order (HDO) (DA 92-224), released March 10, 1992), adopted in accordance with Section 309 (e) of the Communications Act of 1934, as amended, 47 U.S.C. Section 309 (e) (1964). An Initial Decision (hereafter "I.D.") was released by Administrative Law Judge Edward J. Kuhlmann on September 16, 1992.

This case, which originally involved five applications, is a two party proceeding for noncommercial FM stations to be located near Orlando, Florida. One applicant changed frequency and amended out of the proceeding. Two other parties dismissed their

applications pursuant to settlement agreements. This left the applications of Central Florida Educational Foundation, Inc. and Hispanic Broadcast Systems, Inc. The Presiding Judge decided the case on the 307(b) issue, relying solely on the Joint Engineering Exhibit.

Hispanic argues herein that it was deprived of due process of law by the Presiding Judge's failure to consider other evidence relating to the 307(b) issue not contained in the Joint Engineering Exhibit and by making a 307(b) decision based entirely on engineering which will not reflect the actual engineering to be utilized by the ultimate winner of this proceeding. Hispanic believes that the selection of an applicant whose Articles of Incorporation limit it to the broadcast of "Bible-based" material is contrary to Section 307(b) of the Communications Act of 1934, as amended, and the First Amendment to the Constitution of the United States. Hispanic argues that the Presiding Judge erred in failing to consider and grant a share-time arrangement. Finally, Hispanic contends that the Presiding Judge erred in failing to enlarge the issues against Central to explore the issue of whether its application as originally filed was suitable as proposed (i.e. whether it submitted a defective application).

QUESTIONS OF LAW PRESENTED

1. Whether the Presiding Judge erred in limiting the evidence on the 307(b) issue to the Joint Engineering Exhibit.

2. Whether the Presiding Judge's ruling deciding the case

solely on engineering differences which will not reflect reality was arbitrary and capricious.

3. Whether selection of an applicant for a noncommercial educational facility whose programming is limited to "Bible-based" programming is contrary to Section 307(b) of the Communications Act of 1934, as amended, and the First Amendment to the Constitution of the United States.

4. Whether the Presiding Judge erred in failing to consider and grant a share-time arrangement.

5. Whether the Presiding Judge erred in failing to enlarge the issues against Central to explore the issue of whether its application as originally filed was suitable as proposed (i.e. whether it submitted a defective application).

ARGUMENT

Whether the Presiding Judge erred in limiting the evidence on the 307(b) issue to the Joint Engineering Exhibit.

1. At the hearing in this proceeding, Hispanic offered into evidence an exhibit identified as Hispanic Ex. 7, entitled 307(b) analysis. Among other things, this exhibit presented evidence that Hispanic would provide a first Hispanic owned/operated Spanish language station to the Hispanic community of approximately 200,000 persons in the Central Florida area. The Presiding Judge rejected this exhibit, ruling that no evidence would be permitted on the 307(b) issue other than that contained in the Joint Engineering Exhibit. (Tr. at 30-32).

2. The Judge reasoned that by participating in the Joint Engineering Exhibit, a party waived its right to present additional evidence relating to the 307(b) issue, based on a previous ruling he had made at the Prehearing Conference. However, a review of the transcript of the Prehearing Conference demonstrates that the Presiding Judge's ruling at the hearing was not consistent with what he had stated during the Prehearing Conference. At the Prehearing Conference, Mr. Smithwick advised the Presiding Judge that the parties had "engaged a consulting engineer to provide a joint engineering exhibit, which would cover the 307(b) issue as well as the other areas in [sic] pops issue." (Tr. at 9). The Presiding Judge then stated (Tr. at 9):

> Judge Kuhlmann: Okay, then it's okay with me. I just didn't want you to -- anything that you're going to challenge, I want you to bring in today. I mean, I want you to outline it in great detail, so that everyone will know what everybody else's case will be.

3. Mr. Dunne then stated (Tr. at 10) that the hearing

division and "all of our consulting engineers" would receive a draft copy of the exhibit at least ten days in advance of the exhibit date, making it clear that it was to be an engineering exhibit to be coordinated by the engineers involved. The Judge acknowledged that he assumed the parties would have an opportunity to comment on the work of the joint engineer. The following was then stated (Tr. at 10-11):

> JUDGE KUHLMANN: And then go back at it, but in the end, you must all agree. Otherwise you have to come in with material today. The choice is not -- I mean, you either do it today or you give up the right to do it today. Okay? Is that understood?
>
> ...
>
> JUDGE KUHLMANN: Good enough. I mean I just -- any number of times I've gotten to hearings and somebody's said oh, by the way, we don't agree with this joint engineering.
>
> Well, it's too late. I simply pay no attention to that whatsoever, so I think if you've agreed to do it, that's fine and as far as I'm concerned, you can comment on it, you can comment internally on it, you cannot comment in the hearing on it unless you want to come in with material today.
>
> Okay?
>
> MR. SHOOK: It makes my life much easier if there's just one engineering exhibit.

4. From the above, it is clear that the Joint Engineering Exhibit was an "engineering" exhibit. It was never intended to be an all-inclusive "307(b) exhibit." The parties agreed to be bound by the engineering contained therein as it related to the 307(b) issue. However, this in no way limited the parties from introducing additional "non-engineering" evidence on the 307(b) issue. Further, even assuming *arguendo* that the Judge intended to limit all 307(b) evidence to whatever was contained in the

Joint Engineering Exhibit, his statement "unless you want to come in with material today" (Tr. at 11) provided an exception to his ruling. Therefore, a reasonable man could correctly conclude from the Presiding Judge's statements at the Prehearing Conference that he would not be precluded from submitting evidence pertaining to the 307(b) issue if he included his proposal in the outline submitted to the Judge that day.

5. In response to the Presiding Judge's rulings, Hispanic's outline was submitted following the Prehearing Conference and included the following outline of proposed Ex. 7:

> The applicants have agreed to employ Kevin Fisher of Smith & Powsentko to prepare a joint engineering exhibit. The applicants will share on a pro rata basis in the cost of hiring the joint engineer. In addition, Hispanic will submit an exhibit to demonstrate that there are no educational FM broadcast stations serving the Hispanic community of the Central Florida area which now numbers approximately 200,000. Indeed, there are no FMs, either commercial or noncommercial, serving the Hispanic community of this area. Hispanic believes that its proposal to provide a first Hispanic owned/operated Spanish language FM station to the Hispanic community of approximately 200,000 persons in the Central Florida area is a factor to be considered under the 307(b) determination to be made in this case.

In light of the fact that Hispanic complied with the Presiding Judge's rulings at the Prehearing Conference by setting forth its proposal to offer additional evidence on the 307(b) issue in the outline submitted to the Presiding Judge, there was no basis for the Presiding Judge rejecting this evidence simply because it was not in the Joint Engineering Exhibit. Hispanic complied with the Presiding Judge's requirements and the rejection of its exhibit, if upheld, would clearly deprive Hispanic of its due process rights in this proceeding. Clearly, the Presiding Judge must be

reversed on this procedural error which unfairly limited Hispanic's ability to prosecute its case in accordance with the procedures enunciated by the Judge.

Whether the Presiding Judge's ruling deciding the case solely on engineering differences which will not reflect reality was arbitrary and capricious.

6. Hispanic disagrees that the second service advantage proposed by Central Florida should be considered dispositive for the reasons set forth in Hispanic's proposed findings at para. 43. As stated therein "[b]ecause Central Florida's programming is limited to "Bible-based" programming, it will not serve the general population and thus the second service advantage is illusory." Further, under the peculiar circumstances of this case, the engineering proposals have been shaped by the dictates of Channel 6 with whom the parties must coordinate their proposals to avoid interference to the television station. In this case, Channel 6 has stated that it prefers the applicants to diplex off its antenna at the highest power possible. However, this request came only after the hearing was over. In response to Channel 6's request, Central has already amended its proposal to increase power to the maximum permitted utilizing an antenna diplexed with Channel 6. Hispanic has likewise prepared (but not yet filed) an engineering amendment to specify the same facilities as Central. (Hispanic is also seeking an alternate Channel which would permit it to amend out of this hearing. However, this proposal would likewise require the cooperation of Channel 6 which is currently being negotiated. If Hispanic is unable to amend out of the hearing it will file the engineering specifying

the same facilities as Central).

7. In light of the above, both applicants will ultimately propose identical facilities as required to meet the concerns of Channel 6. Indeed, the only reason for a difference in the proposals as of the B cut-off date is the fact that Channel 6 had told Central that it could locate on the Channel 6 tower while telling the rest of the applicants that they could not. Thus a mistake by Channel 6 in communicating what it ultimately wanted the other applicants to do serves as the sole basis for a decision in this hearing. For a decision to rest on such a matter is arbitrary and capricious.

Whether selection of an applicant for a noncommercial educational facility whose programming is limited to "Bible-based" programming is contrary to Section 307(b) of the Communications Act of 1934, as amended, and the First Amendment to the Constitution of the United States.

8. Central Florida's Articles of Incorporation limit it to the operation of "an FM radio station to broadcast educational programs which are Bible-based..." (Central Florida Ex. 1). While this is a commendable objective, it is limited in scope. Section 73.502 of the Rules and Regulations of the Federal Communications Commission states that "the Commission will take into consideration the extent to which each application meets the requirements of any statewide plan for noncommercial educational FM broadcast stations filed with the Commission, provided that such plans afford fair treatment to public and private educational institutions, urban and rural, at the primary, secondary, higher, and adult educational levels, and appear otherwise fair and equitable."

9. Standing alone, Central Florida's proposal does not meet the objectives of Section 73.502 of the Rules because of the limitation of its programming to "Bible-based" programming. While such a proposal would foster "private" educational objectives, it stands opposed to public educational objectives which are secular in nature. This is not a case involving a private institution with a religious orientation. A religious institution may provide both religious and secular instruction. However, Central Florida is limited by its Articles of Incorporation to Bible-based programming and thus is precluded from offering secular instructional programming.

10. While Hispanic recognizes that Section 73.502 is not directly applicable to the case at bar, it is respectfully submitted that Section 73.502 sets forth the Commission's objectives in assuring that noncommercial stations are licensed in accordance with Section 307(b) of the Act. It is respectfully submitted that Section 307(b) is not served by a program service which would be limited to Bible-based programming because such a proposal would not meet the secular objectives of a state-wide plan of higher education.

11. Because Central Florida's programming is limited to "Bible-based" programming, it will not serve the general population and thus the second service advantage is illusory. Furthermore, it will not meet the objectives of 307(b) because it will not serve secular objectives as well as private objectives. Finally, the preference of an applicant which has so limited its programming is contrary to the First Amendment to the United

States Constitution. While the First Amendment precludes discrimination against religious groups, it also precludes discrimination on behalf of religious groups.

12. In the instant case, Central Florida is seeking a "dispositive preference" for the broadcast service which it proposes to provide. However, that service is, by virtue of the applicant's Articles of Incorporation, restricted to religious programming that is "Bible-based." Consequently, the award of a preference in such circumstances is tantamount to a government-sanctioned promotion of the religious beliefs of Central Florida.

13. This is not to say that Central Florida should be denied a preference simply because its principals hold a certain religious view. For example, it would be improper for a local school board to refuse to hire "Christians" or "Jews" simply because they hold certain personal religious beliefs. Such an action would constitute religious discrimination. However, if the individual seeking employment stated that he would provide only "Bible-based" instruction, the school board would appear justified in refusing to hire this individual since it is not the purpose of the school system to promote "Bible-based" beliefs. It is one thing for a person to hold to a belief in "Creation" versus "Evolution," it is quite another thing for the State to provide such a person with a platform to advance his particular beliefs to the exclusion of all other beliefs.

14. Likewise, it is one thing for the Commission to grant a preference to an entity whose principals are Christians or Jews. However, it is quite another thing to grant a "service prefer-

ence" to an entity such as Central Florida which is restricted by its charter from carrying any programming that is not Bible-based. This would be tantamount to providing a platform to Central Florida to advance its Bible-based beliefs to the exclusion of all other beliefs. This is clearly precluded by the establishment clause of the U.S. Constitution. It is also contrary to the intent of 307(b) of the Communications Act which is designed to promote the "fair, efficient and equitable" distribution of radio services.

Whether the Presiding Judge erred in failing to consider and grant a share-time arrangement.

15. The Presiding Judge held (I.D., F.N. 1) that Hispanic's request for a shared use of the frequency was "unsupported by a factual showing" because "[n]o shared time proposal is made in the Joint Exhibit. For the reasons discussed hereinabove, the Review Board should hold that the Presiding Judge erred in limiting evidence on the 307(b) issue to the Joint Engineering Exhibit. Hispanic submitted evidence (Hispanic Ex. 6) that it favored an imposed share-time arrangement. Hispanic would be the first Hispanic FM station in the market, and the only Hispanic noncommercial educational station. It believes that the service it is proposing is of such importance to the Hispanic community that it is willing to share time with the other applicant to assure that the Hispanic community obtains at least some participation in educational radio in the Orlando market (Hispanic Ex. 6).

16. Southwest Florida Community Radio, Inc. stated in its proposed findings, at p. 26, that it favored an imposed share-time arrangement. Bible Broadcasting Network, Inc. also stated

(at para. 44-46 of its findings) that it supported an imposed share-time arrangement. Since Central Florida failed to submit evidence on this issue, the only evidence of record supported an imposed share-time arrangement, and the Presiding Judge should have ruled that an imposed share-time arrangement would serve the public interest.

17. Since both Hispanic and Central Florida see the need to broadcast Spanish-language programming in the community, a share-time arrangement would be consistent with the objectives of both applicants. Further, because Hispanic is a secular organization, a share-time arrangement between Hispanic and Central Florida would further the interests of Section 307(b) of the Act since it would meet both private and secular educational objectives.

18. In light of the fact that both applicants propose Spanish-language programming in the evening, it is respectfully requested that the Review Board impose a 50/50 share-time arrangement between these applicants, granting Hispanic the hours 3:00 p.m. to 3:00 a.m. to permit it to serve the Hispanic community during the evening hours.

Whether the Presiding Judge erred in failing to enlarge the issues against Central to explore the issue of whether its application as originally filed was suitable as proposed (i.e. whether it submitted a defective application).

19. On July 27, 1992, Hispanic filed a motion to enlarge issues against Central, seeking various issues regarding Central's proposed use of the Channel 6 tower. The Presiding Judge denied the motion to enlarge in his Memorandum Opinion and Order, FCC 92M-875, released August 13, 1992. As indicated therein,

Hispanic sought to enlarge the issues to determine whether Central's tower site was suitable for its proposal when it filed its application (Order at para. 2).

20. As discussed in the Presiding Judge's ruling, Central's response to the motion to enlarge issues included a statement from the Channel 6 engineer, stating that Central was given permission to use the Channel 6 tower. The Channel 6 engineer "does not, however, explain whether he gave Central permission to locate on the tower without diplexing." (Order at para. 2). As stated by the Presiding Judge (Order at para. 2):

> Diehl has provided an enigmatic response in which he only states that diplexing was never discussed. His statement only raises a question about what was discussed since he did write to other applicants and say there was no room on the tower.

Nevertheless, the Presiding Judge denied the request for enlargement of issues.

21. Hispanic believes that the Presiding Judge's ruling was in error. It is axiomatic that an applicant must specify a viable antenna site, "otherwise its application [is] substantially incomplete and patently not in compliance with the Commission rules, and [the applicant] would be technically unqualified to be a Commission licensee." Colorado Television, Inc., 56 RR 2d 1080 (Rev. Bd. 1984). Further, an applicant must make efforts to assure that it maintains its site throughout the application process. Alden Communications Corp., 2 FCC Rcd. 3462, 3463 (Rev. Bd. 1987). Berea Broadcasting Co., Inc., 4 FCC Rcd. 8813, 67 RR 2d 405, 406 (Rev. Bd. 1989).

22. Central Florida did not have a viable site when it

filed its application. The only way Central Florida could use the Channel 6 site was to diplex which it did not propose doing until its B cut-off amendment. Commission precedent is clear that a proposed site must be "suitable" for the proposed use. See, El Camino Broadcasting Corp., 12 RR 2d 1057 (Rev. Bd. 1968); Braverman Broadcasting Co., Inc., 33 RR 2d 1667 (1975). Mr. Diehl has made it clear that there was no room on the Channel 6 tower (motion to enlarge, Exhibit 2). Since there was and is no room on the Channel 6 tower and Central Florida did not propose to diplex with the Channel 6 antenna in its original application, the site as originally proposed was not suitable, and an appropriate issue should have been specified.

23. Moreover, Channel 6 stated in its letter of July 10, 1992 that the co-owner of the site would have to approve any proposal to use the tower. Central Florida stated in its application that the proposal had been coordinated with Channel 6 but failed to mention any approval by the co-owner of the tower, thereby raising the question of whether the required approval had ever been obtained. This matter has never been addressed by Central.

24. Further, an issue should have been granted in the circumstances of this case to explore why Channel 6 (apparently mistakenly) granted permission to one applicant to use its tower and denied permission to three others, with the result that the applicant which was mistakenly granted permission obtained a grant due to the superior coverage obtained from the site withheld to the other three applicants. These circumstances must be

more fully explored in relation to the 307(b) and comparative issues specified in this case since the result has been to pre-empt the Commission as decision-maker in this proceeding. In effect, Channel 6 has determined the ultimate winner in this proceeding by its actions in relation to the use of its transmitter site. Without a detailed analysis of how this came about, the selection of an applicant through a process which became totally a matter of the whim of Channel 6's actions is arbitrary and capricious and has denied Hispanic of due process of law.

WHEREFORE THE PREMISES CONSIDERED, it is respectfully requested that the Review Board grant these Exceptions and reverse the Presiding Judge's decision in this proceeding.

Respectfully submitted,

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October 16, 1992

CERTIFICATE OF SERVICE

James L. Oyster hereby certifies that he has sent a copy of the foregoing EXCEPTIONS by first class U.S. mail, postage prepaid, or by hand delivery, on or before the 16th day of October, 1992, to the following:

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